87-1307

Supreme Court, U.S.
FILED
JAN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States
October Term, 1987

Salvador W. Porto,
Petitioner,

vs.

Armco, Inc.; Mellon Bank, N.A., Trustee;
Armco, Inc. Benefit Plans Administrative
Committee
Respondents

On Writ of Certiorari from the
United States Court of Appeals, Eighth
Circuit
Case No. 86-250-WM

PETITION FOR WRIT OF CERTIORARI

Michael W. Manners
311 W. Kansas
Independence, MO 64050
(816) 836-8000
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

5

QUESTION PRESENTED

May an employee retirement plan administrator disclose plan modifications to select groups of plan participants, excluding other factions of participants, without violating the fiduciary requirements set forth in 29 U.S.C. 1104 - provided all plan participants receive notification of the modifications within the time period prescribed by 29 U.S.C. 1024 (b)(1)(B)?

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PREVIOUS JUDICIAL HOLDINGS

The Honorable John W. Oliver of the Western District Court of the State of Missouri entered judgment for Defendants on October 20, 1986 and signed a Memorandum and Order granting summary judgment to defendants, Armco, Inc. Plaintiff's motion to amend said order was denied on November 20, 1986 by the Honorable Judge Oliver. Said orders with accompanying judicial comments are appended.

Plaintiff appealed his case to the United States Court of Appeals for the Eighth Circuit. The lower court's decision was upheld in an opinion filed August 10, 1987 and appended hereto. Subsequent motion for rehearing was denied on October 12, 1987.

JURISDICTION

This action falls under the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq. This petition for writ of certiorari is filed in conjunction with the August 10, 1987 decision of the United States Court of Appeals for the Eighth Circuit. Said decision was followed by a motion for rehearing which was denied on October 12, 1987 as evidenced by the appended order. This petition is timely filed within ninety (90) days of the October 12, 1987 order.

Jurisdiction is bestowed on this court under Supreme Court Rule 17.1 in that a lower federal court has decided an important question of federal law which should be settled by this court.

CITATION OF APPLICABLE FEDERAL STATUTES

The purpose of the Employee Retirement Income Security Act (ERISA) is set forth in 29 U.S.C. 1001, and most specifically subsection (b), which states:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts.

The fiduciary duties of a plan administrator are set forth in 29 U.S.C. 1104:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

The time requirements imposed upon a plan administrator for furnishing information to participants regarding new provisions is set forth in 29 U.S.C. 1024 (b)(1)(B), which states in part:

If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

STATEMENT OF THE CASE

This is an action under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. 1001 et seq., in which petitioner alleged a breach of fiduciary duty as described in 29 U.S.C. 1104(A) by the administrator of petitioner's retirement thrift plan. The breach occurred when the plan administrator notified all actively employed plan participants of a plan modification which permitted revocation of previously irrevocable retirement investment elections. Said written notification of the plan modification was mailed to all actively employed plan participants on February 1, 1982. Retired plan participants did not receive the February 1 notice.

Petitioner retired from Armco, Inc. on

January 31, 1981, following 39 years of active service. Upon retirement he made what was then an irrevocable retirement investment in Armco stock. As the stock began to plummet, petitioner asked the plan administrator if the election could be changed. The request was denied in a letter written to petitioner on August 19, 1981.

The plan modification, effective January 1, 1982, permitted retired participants to revoke previously irrevocable elections. However, petitioner, among other retirees, did not receive the written notification mailed only to actively employed plan participants. Petitioner first learned of the modification during an informal conversation with the Plan Administrator in October 1982. He subsequently

received written notification in March 1983 when he received a new Summary Plan Description containing the modification. (Defendant claims Petitioner received constructive notice of the modification in April 1982 by way of a "Prospectus" which mentioned the modification. However, petitioner denies receiving a prospectus and there is no evidence the prospectus was mailed to retired participants.)

Between the time actively employed participants were notified of the plan modification and the time petitioner happened to learn of the modification, petitioner's investment had decreased in value approximately $40,000.00. Petitioner therefore brought suit against the plan administrators for damages resulting from disparate

disclosure of plan modifications, alleging breach of fiduciary duties set forth under 29 U.S.C. 1024 (b)(1).

The October 20, 1986 Memorandum and Order prepared by Honorable John W. Oliver of the U.S. District Court, Western Division, of the Western District of Missouri granted Defendant's motion for summary judgment. The memorandum holds as long as Petitioner received notice within 210 days following the year in which the change was adopted, as set forth in 29 U.S.C. 1024(b)(1), there could have been no breach of fiduciary duty. The order states on page 4:

> Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time. It is sufficient that participants are adequately informed before the disclosure deadline. Neither does this disparate treatment constitute a

> violation of the administrator's general fiduciary duty imposed by 29 U.S.C. 1104. It was not imprudent for administrators to provide different types of notice to active and retired employees according to their respective needs, as long as all participants were timely notified.

Petitioner maintains the lower court erred in interpreting the fiduciary duties of plan administrators under ERISA. Plaintiff's motion to amend said judgment was denied on November 25, 1986. Appeal was filed with the U.S. Court of Appeals for the Eighth Circuit. The subsequent opinion filed August 10, 1987 affirmed the lower court's decision and in concluding stated:

> The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. Common law trust principles provide the foundation for the statutory standard, which prohibits the use of plan assets for the primary benefit of a party other than the plan itself.
>
> A plan administrator's duty to disclose information to plan

> participants is another matter, dealt with separately by ERISA. Although it can be argued that the local plan administrator should have informed the retired participants of the amendment when the active employees were so informed, we conclude that the district court did not err in holding that an administrator who complies with the statutory standard for disclosure cannot be said to have breached the fiduciary duty by not providing earlier disclosure.

Subsequent petition for rehearing was denied on October 12, 1987. Wherefore, Petitioner now asks this court to grant a Writ of Certiorari.

PRESENTATION OF ARGUMENT

Petitioner seeks a Writ of Certiorari under the authority of Supreme Court Rule 17.1 for the reasons that:

A federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The fact

situation presented is one of first impression which has not previously been entertained by a federal court and is appropriate for consideration by this Court to insure uniformity in future such fact situations and provide guidance for retirement plan administrators.

A federal court of appeals has decided an important question of federal law in a way that conflicts with prior holdings of other federal courts under different factual circumstances. An Ohio district court examined standards of fiduciary duty relating to the favoring of plan participants over plan beneficiaries in implementing plan revisions. The court stated, "the fiduciary is forbidden from granting preference as between a plan's participants or as between a plan's

beneficiaries. Bearing in mind that a fiduciary in discharging his duties must not grant preferences, this court will next examine the conduct of plaintiff-trustees" Winpisinger, et al. vs. Aurora Corporation of Illinois, Precision Castings Division, 456 F. Supp. 559, 566 (N.D. Ohio E.D. 1978).

The present holding conflicts with the attitude taken in the Winpisinger holding. The Missouri District Court, affirmed by the Court of Appeals, stated: "Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time...Neither does this disparate treatment constitute a violation of the administrator's general fiduciary duty imposed by 29 U.S.C. 1104." Is one to

believe that disparate treatment of plan participants and beneficiaries is condoned by the federal courts in matters of disclosure?

Standards of judicial review for fiduciary obligations are set forth in Talarico v. United Furniture Workers Pension Fund A, 479 F. Supp. 1072, 1080 (D. Neb. 1979). Although the case does not pertain to "disclosure" activity, neither does it cite an exception for reviewing disparate fiduciary disclosures.

The current holding of the eighth circuit opens the door for retirement plan administrators to favor small groups of participants, and individuals, by providing advantageous investment information at the earliest opportunity. In the instant case, one group of

participants was informed of a January 1 modification just thirty days later. Under the current holding, the remaining participants could have been kept in the dark for one year and 210 days following the modification.

Granting this writ is essential to avoid future conflicting holdings, and provide clear cut guidelines for the courts and plan administrators.

Respectfully submitted,

H. Kent Desselle MO# 23819
Counsel of Record
Truman Law Building
14701 E 42 St.
Independence, MO 64055
(816) 373-2060
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	Docket No.
	)	85-0406-CV-W-1
	)	
vs.	)	Federal Judge
	)	or U.S.
ARMCO, INC., et al.,	)	Magistrate
	)	John W. Oliver
	)	
Defendants.	)	

___ **Jury Verdict.** This action came before the Court and a jury with the above named judge (magistrate) presiding. The issues have been duly tried and the jury has duly rendered its verdict.

xxx **Decision by Court.** This action came on consideration before the Court with the above listed judge (magistrate)

presiding. The issues have been duly tried (heard) and a decision has been duly rendered.

IT IS ORDERED AND ADJUDGED,

Plaintiff has failed to demonstrate that defendants violated any of their ERISA duties. Thus, his motion for summary judgment must be denied and judgment entered for defendants.

In addition, defendant Armco cannot be held liable under ERISA for breach of fiduciary duty. As the employer and thrift plan sponsor, Armco's duty was limited to the selection of a proper plan administrator. There is no allegation herein that Armco was negligent in that selection.

Accordingly, it is

ORDERED (1) that plaintiff's motion for summary judgment should be and is

hereby denied. It is further

ORDERED (2) that defendants' motion for summary judgment should be and is hereby granted.

Entered on October 21, 1986.

A True Copy

TEST:

R.F. Connor, Clerk October 20, 1986

By: /s/ (Illegible)

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	No. 85-0406-CV-W-1
	)	
vs.	)	
	)	
ARMCO, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

On October 20, 1986, this Court ordered entry of judgment in this case for defendants after granting their motion for summary judgment. The case now pends on plaintiff's motion to amend judgment. For the reasons stated, plaintiff's motion will be denied.

In his suggestions in support of his motion, plaintiff directs this Court's attention to two district court cases from Ohio and Nebraska. Those cases,

however, are inapposite.

Talarico v. United Furniture Workers Pension Fund A, 479 F.Supp. 1072 (D. Neb. 1979), involved a situation in which employer contributions to a pension fund were being refused by the Fund because those contributions did not cover all employees. After defining the fund trustees' fiduciary duty under ERISA, and noting the Court's limited role in reviewing an exercise of discretion by the trustees, the Court concluded that the trustees had acted reasonably. Id. at 1081. In Winspisinger v. Aurora Corp., 456 F. Supp. 559 (N.D. Ohio 1978), the Court's discussion of the ERISA fiduciary duty arose out of its evaluation of trustees' retroactive cancellation of the past service credit of special class

employees. Id. at 566-567. Though both cases define the fiduciary duty created by ERISA, neither lends any authority to the proposition that that duty is breached when, as here, timely notice is provided to all participants in a plan, albeit by varying means. Indeed, neither case involved issues of disclosure at all.

Plaintiff has again failed to demonstrate that defendants breached any duty owed him under ERISA or that they acted imprudently. Defendants' timely disclosure of the plan amendment to plaintiff fulfilled their statutory and regulatory obligations. Thus, plaintiff's motion to amend judgment must be denied.

Accordingly, it is

ORDERED that plaintiff's motion to

amend judgment should be and is hereby denied.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

November 25, 1986

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	No. 85-0406-CV-W-1
	)	
vs.	)	
	)	
ARMCO, INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDERS

This action, brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 et seq. (ERISA), pends on cross-motions for summary judgment on the issue of liability. For the reasons stated, defendants' motion for summary judgment will be granted and plaintiff's motion will be denied.

The parties have entered into a full stipulation of facts and have agreed that no additional evidence is necessary for the decision of the liability issue.

(See Joint Stipulation of Facts, Item (3)). The material facts may be summarized as follows. Plaintiff served as an employee of defendant Armco for 39 years. From 1964 onward, plaintiff participated in the Armco "Thrift Plan for Salaried Employees," a profit sharing plan subject to the provision of ERISA. On September 30, 1980, just prior to his retirement effective January 31, 1981, plaintiff elected to withdraw his basic and supplemental contributions to the plan, and defer distribution of Armco contributions in his account and earnings thereon for five years. At the time plaintiff made that election, plan regulations provided that it was irrevocable.

On June 26, 1981, plaintiff wrote a letter to plan administrators requesting

that his plan account be liquidated and all proceeds remitted to him. (See Exhibit A attached to Defendants' Motion for Summary Judgment on Liability and Suggestions in Support Thereof). Plaintiff received a reply to his request informing him that his irrevocable election to defer distribution for five years precluded present liquidation of his account.

In January 1982, due to changes in the tax code, the thrift plan was amended to permit participants to revoke previously irrevocable elections made upon retirement. Although defendant Armco asserts that on or about April 29, 1982 a plan prospectus was mailed to all active and retired plan participants, plaintiff claims that he did not learn of the amendment allowing him to revoke

his retirement election until he spoke with a local plan administrator in October 1982. (See Joint Stipulation of Facts Nos. 31 and 33). Plaintiff also received a 1982 Summary Plan Description, which clearly set forth the election modification, as an enclosure with a letter from the Insurance and Benefits Program Supervisor dated March 3, 1983. (See Joint Stipulation of Facts Nos. 37-38).

Plaintiff contends that defendants failed to provide him with notice of the amendment in time to allow him to withdraw remaining funds before his account diminished in value, and that they thereby breached their fiduciary duties. We disagree.

When it enacted ERISA, Congress created duties of disclosure and

reporting which must be met by administrators of plans covered thereunder. Section 1024(b)(1) requires plan administrators to furnish summary descriptions of modifications and changes in the plan not later than 210 days after the end of the plan year in which the change is adopted.

Here, the modification allowing revocation of retirement elections was adopted on January 1, 1982. Thus, the ERISA deadline by which the modification had to be disclosed was July 29, 1983. Plaintiff admits that he learned he could withdraw the funds in his account during a conversation with a plan administrator in October 1982. (See Joint Stipulation of Facts No. 33). In March 1983, plaintiff received a copy of the 1982 Summary Plan Description which

clearly explained the modification rendering elections revocable. (See Joint Stipulation of Facts No. 38). The provision of a summary plan description which incorporates material modifications is an acceptable method of disclosure. See 29 C.F.R. 2520.104b-3(b) (1985). Thus, plaintiff received notice that was both timely and adequate under the statute and applicable regulations. Indeed, by his own admission, plaintiff had actual knowledge of the modification even before the end of the year in which it was adopted.

Plaintiff argues, however, that defendants somehow breached their duties by failing to provide notice at the same time and in the same manner to retired employees as they did to active

employees. Active employees received a letter on February 1, 1982 outlining changes in the plan, among which was the new revocability of retirement elections.

Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time. It is sufficient that participants are adequately informed before the disclosure deadline. Neither does this disparate treatment constitute a violation of the administrators' general fiduciary duty imposed by 29 U.S.C. Section 1104. It was not imprudent for administrators to provide different types of notice to active and retired employees according to their respective needs, as long as all

participants were timely notified.

Plaintiff also contends that defendants breached their fiduciary duties because, although plaintiff's letter put them on notice of his desire to liquidate his account, they failed to immediately notify him of the modification permitting such liquidation. Thus, he argues, they are liable for damages modeled after those provided for by 29 U.S.C. Section 1132(c). That section imposes personal liability on plan administrators for refusing to supply requested information which they are under a duty to disclose within 30 days of the request. Plaintiff attempts to characterize his June 26, 1981 letter as a notice to the administrators of his interest in any modification that would allow him to

liquidate his account, and argues that plan administrators therefore had a duty to immediately notify him of the January 1982 modification.

Acceptance of plaintiff's argument would impermissibly extend the scope of the duties imposed by ERISA. Even if plaintiff's June 26, 1981 letter, which was essentially an order to liquidate rather than a request for information, can be construed to have put defendants on notice, they did not violate their fiduciary duties to plaintiff. Because this modification had not yet been adopted at the time they received plaintiff's letter, defendants lacked the authority to liquidate his account, and they properly so informed him. Further, defendants' earlier receipt of the letter did not impose on them a

special duty to immediately notify plaintiff of modifications to the plan. Defendants' fiduciary duty does not extend so far as to require individualized notice of an event on the basis of requests made over six months before it occurred. Moreover, to read such a duty into ERISA would unreasonably burden plan administrators.

Although this case appears to present unique factual circumstances, other cases decided under ERISA support the principle that the statutory fiduciary and disclosure duties do not encompass individualized attention for particular employees. See, e.g., Shlomchik v. Retirement Plan of Amalgamated Insurance Fund, 502 F. Supp. 240, 245 (E.D. Pa. 1980), aff'd, 671 F.2d 496 (3d Cir. 1981) (failure to individually alert

past participants of pension plan requirement not a violation of ERISA fiduciary duty); Allen v. Atlantic Richfield Retirement Plan, 480 F. Supp. 848, 851 (E.D. Pa. 1979), aff'd, 633 F.2d 209 (3d Cir. 1980) (no duty to inform individual about advantages of a particular election under a plan); see also Sleichter v. Monsanto Co., 612 F. Supp. 856, 859 (E.D. Mo. 1985) (no duty to disclose possibility of adoption of new benefits even though participant made inquiry); Sutton v. Weirton Steel Division of National Steel Corp., 567 F. Supp. 1184, 1196 (N.D. W. Va. 1983), aff'd, 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984) (no duty to disclose amendments before they are affected).

The plaintiff has failed to demonstrate that defendants violated any of their ERISA duties. Thus, his motion for summary judgment must be denied and judgment entered for defendants.

In addition, defendant Armco cannot be held liable under ERISA for breach of fiduciary duty. As the employer and thrift plan sponsor, Armco's duty was limited to the selection of a proper plan administrator. There is no allegation herein that Armco was negligent in that selection. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985).

Accordingly, it is

ORDERED (1) that plaintiff's motion for summary judgment should be and is hereby denied. It is further

ORDERED (2) that defendants' motion for summary judgment should be and is hereby granted. It is further

ORDERED (3) that the Clerk is directed, pursuant to Rule 58 of the Federal Rules of Civil Procedure, to enter final judgment on a separate document against the plaintiff and for defendant Armco, Inc. and for defendant Armco, Inc. Benefit Plans Administrative Committee.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

October 20, 1986

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2500

Salvadore W. Porto,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the
	)	United States
Armco, Inc.;	)	District Court
Mellon Bank,	)	for the Western
N.A., Trustee; Armco,	)	District of
Inc. Benefit Plans	)	Missouri
Administrative	)	
Committee,	)	
	)	
Appellees.	)	

Submitted: July 6, 1987

Filed: August 10, 1987

Before McMILLIAN, JOHN R. GIBSON, and WOLLMAN, Circuit Judges.

PER CURIAM.

Salvador Porto, a retired Armco, Inc. employee, appeals from the district court's[1] order granting Armco, Inc. Benefit Plans Administrative Committee (Administrator) summary judgment on Porto's claim under the Employee Retirement Income Security act, 29 U.S.C. Sections 1001, et seq. (ERISA). For reversal, Porto argues that the district court erred in concluding that the Administrator did not breach its fiduciary duty by failing to inform Porto and other retired plan participants of a modification to plan regulations when active employees were so informed. We affirm.

I. BACKGROUND

Porto retired from Armco, Inc.

---

[1]The Honorable John W. Oliver, United States District Judge for the Western District of Missouri.

effective January 31, 1981, after 39 years of employment. He was a participant in the company's ERISA-covered profit sharing plan, which provided for employee contributions and 50% matching contributions from Armco, which had to be used to purchase Armco common stock. Upon his retirement Porto elected to receive from his plan account his own contributions and to defer for five years distribution of Armco's contributions and earnings thereon. Porto knew that the decision to defer this distribution was irrevocable under the then applicable plan regulations.

On June 26, 1981, Porto wrote to the Administrator that because of changed family circumstances he was requesting distribution of his remaining account, i.e., that his Armco stock be sold and

that he be sent its cash value plus earnings. By letter dated August 19, 1981, the Administrator told Porto that the plan regulations did not permit such a change in his retirement election. During this time, the value of Armco common stock was steadily falling.

In January 1982, prompted by a change in the Internal Revenue Code, the plan adopted an amendment to its regulations to permit the once irrevocable decision on withdrawal choices upon retirement to be revocable. Porto's local plan administrator, appointed by the Administrator, sent a letter to all local employed plan participants on or about February 1, 1982, advising them of this amendment. The letter was not sent to the local retired participants such as Porto. Porto did not learn of the

revocability amendment until he spoke with the local plan administrator on October 1, 1982. In March 1983 Port received a plan description which set forth the revocability amendment.

When Porto learned of the amendment on October 1, 1982, he did not ask for immediate distribution of this account. Rather, on October 7, 1982, he requested a partial, and on July 6, 1983, a full transfer from the Armco Common Stock Fund to the Diversified Stock Fund. Finally, on April 2, 1985, Porto authorized the withdrawal and cash distribution of his entire remaining account.

In his complaint, Porto claimed that the Administrator and Armco breached their ERISA-imposed fiduciary duties by their failure to inform the retire plan

participants of the revocability amendment when the active participants were so informed. He sought as damages the difference in the value of his Armco common stock on the date he claims he should have been informed and on October 1, 1982, the date he actually was informed. The issue of liability was submitted to the district court on cross-motions for summary judgment, on stipulated facts and other designated evidentiary material.

In granting Armco and the Administrator summary judgment, the district court noted that Porto was notified of the amendment within the time limit provided for in ERISA, 29 U.S.C. Section 1024(b)(1),[2] for disclosure of modifications in a plan. The district court held that Armco and the Administrator did not have an obligation to notify retired employees at the same time and in the same manner as active employees so long as

---

[2] 29 U.S.C. Section 1024(b)(1)(B) provides as follows:

> If there is a [material] modification or change in the terms of the [plan] . . . , a summary judgment description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

notification to all participants was timely under the statute. The district court also concluded that Porto's June 26, 1981, letter did not trigger 29 U.S.C. Section 1132(c), which imposes liability upon plan administrators for refusing to supply requested information within 30 days of the request. Finally, the district court held that Porto's June 1981 letter did not impose upon Armco and the Administrator a special individualized duty toward Porto.

Porto appeals only from the judgment in favor of the Administrator, and he challenges only the district court's conclusion that the Administrator's compliance with ERISA's disclosure provision precludes a breach-of-fiduciary-duty claim.

II. ANALYSIS

ERISA, 29 U.S.C. Section 1104(a), imposes a prudent person standard of care upon plan fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) either the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The district court did not make a finding that the Administrator had acted in a reasonable manner. Rather, the court in effect concluded that, as a

matter of law, a breach-of-fiduciary-duty claim cannot be based on a failure to disclose when the statutory disclosure requirements have been met.

The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. Common law trust principles provide the foundation for the statutory standard, which prohibits the use of plan assets for the primary benefit of a party other than the plan itself.

A plan administrator's duty to disclose information to plan participants is another matter dealt with separately by ERISA. Although it can be argued that the local plan administrator should have informed the retired participants of the amendment when the active employees were so

informed, we conclude that the district court did not err in holding that an administrator who complies with the statutory standard for disclosure cannot be said to have breached the fiduciary duty by not providing earlier disclosure.

III. CONCLUSION

The district court's order is affirmed.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[TO BE PUBLISHED]

---

[3]We have considered, and hereby deny, appellee's motion to dismiss the appeal for want of a proper notice of appeal.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2500

Salvadore W. Porto,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the
	)	United States
Armco, Inc.; Mellon	)	District Court
Bank, N.A., Trustee;	)	for the Western
et al.,	)	District of
	)	Missouri
	)	
Appellees.	)	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 12, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals,
Eighth Circuit